IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLORENTINO ENCINAS-SIERRAS, *Appellant,*	
vs.	No. 22,720
UNITED STATES OF AMERICA, *Appellee.*	

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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I.

JURISDICTIONAL STATEMENT OF FACTS

This case was initiated by the return of an Indictment by the Federal Grand Jury sitting at Tucson, Arizona, on December 6, 1967. (Clerk's Record, page 4. Hereinafter, the Clerk's

Record will be referred to as "RC"; the Reporter's Transcript will be referred to as "RT"; the number following will refer to the page and the number following "L" will refer to the line. Appellant Florentino Encinas-Sierras will be referred to as Appellant or as Encinas-Sierras.)

The Indictment was in one count charging Appellant with having fraudulently and knowingly imported, and caused to be imported, and brought into the United States of America from the United States of Mexico at Nogales, Arizona, contrary to law, approximately 53.9 grams of heroin, a narcotic drug, on or about November 15, 1967, in violation of 21 U.S.C. §174 (RC 4). On December 11, 1967, Appellant appeared in person and by his retained counsel, H. Earl Rogge Jr., and pled not guilty (RC 18). On December 21, 1967, Appellant filed a motion for reduction of bond and the motion was heard and denied (RC 5).

Trial was held on January 26, 1968, before Judge James A. Walsh and the jury returned a verdict of guilty (RC 8). On January 31, 1968, Appellant filed a motion for new trial (RC 9). On February 1, 1968, the Government filed a memorandum in opposition to the motion for new trial (RC 11). On February 1, 1968, the Court heard argument on the motion for new trial and denied it (RC 19), and sentenced Appellant to ten years (RC 12). On February 8, 1968, the Court denied a motion for reduction of sentence (RC 19). On February 9, 1968, Notice of Appeal was filed (RC 13). On February 21, 1968, the Court entered an Order granting leave to appeal in forma pauperis and also appointing his trial counsel as counsel for the appeal (RC 15, 16). Appellant is in custody.

The Trial Court had jurisdiction of the Appeal by the provisions of 18 U.S.C. §3231. This Court has jurisdiction of the Appeal by the provisions of 28 U.S.C. §1291.

II.

STATEMENT OF FACTS

At about noon on November 15, 1967, Customs Port Investigator Everett H. Turner arrived at the Morley Avenue Gate, the smaller of the two gates at the port-of-entry, at Nogales, Arizona, from Mexico into the United States (RT 21, L 10 to 23, L 21). Customs Inspector William Fellars saw the Appellant in a 1958 International pickup truck coming from Mexico and entering the United States at the Morley Avenue Gate (RT 49, L 10-16). Turner saw the Appellant in the said 1958 International pickup truck at about 2:00 p.m. just pulling away from the Inspector's area (RT 24, L 1-15). Turner jumped onto the truck and the Appellant grabbed the door handle on the driver's side (RT 24, L 18-20). Turner grabbed the Appellant's arm and turned the motor off (RT 24, L 25). Turner took the Appellant into the building with Customs Inspector Williams Fellars (RT 25, L 4-7; 49, L 20). Turner went out to move the pickup and search it (RT 25, L 18-20). Fellars frisked the Appellant and then had him empty his pockets (RT 49, L 24-25). Turner returned and asked the Appellant if he was bringing anything from Mexico and the Appellant said no; Turner then told him he was going to search his person (RT 26, L 12-18). Then, with Fellars, Turner had the Appellant step into the search room (RT 50, L 2-3; 26, L 20-24). Turner asked him to drop his pants and as the Appellant did this, Turner smelled a distinct odor which he recognized (RT 26, L 25 to 27, L 2). Turner then asked him to drop his undershorts, and the Appellant snapped the elastic; Turner repeated the request and again the Appellant snapped his shorts (RT 27, L 9-11). Turner again asked and then the Appellant dropped his undershorts (RT 27, L 12). Turner saw a piece of white paper sticking out of his shorts,

which paper contained two rubber contraceptives (RT 28, L 1-10). These became Government's Exhibit 2 in evidence. (The chain of custody will not be set out since it is not in issue.) One of the two rubber contraceptives contained 55.3 grams or 1.95 ounces of 46.8% pure heroin (RT 78, L 16 to 79, L 24).

The Appellant testified in his own behalf (RT 81-94). He stated that he had earned the $240 cash he had on him when arrested, working as a bartender for the Frontera Bar in Nogales, Sonora, Mexico, where he had a Pete Martinez as a customer (RT 81-84). He testified this Martinez attempted to become friendly with him in the three months Martinez was a customer (RT 84, L 9-20). On the day the Appellant was arrested, November 15, 1967, he said he met Martinez with a man called Johnny on the corner of Obregon Avenue and Campillo Street in Nogales, Sonora, Mexico (RT 86, L 5-16). Martinez asked him to carry a package across for him into the United States for $5.00 and lent the Appellant his pickup truck (RT 87, L 18-88, L 5). Martinez told him to carry it inside his shorts (RT 88, L 9-12). He denied knowing what was in the package (RT 88, L 24-25). Appellant testified he met Martinez and received the package ten minutes before he was arrested (RT 94, L 4).

III.
OPPOSITION TO SPECIFICATION OF ERRORS

1. The Court did not err in refusing to allow Appellant's Counsel to learn the identity of the informer.

2. The Court did permit the Government witness to state whether or not the informant was a Johnny Grant.

3. The Court did not err in refusing to instruct on entrapment.

IV.
SUMMARY OF ARGUMENT

1. The Court properly sustained the Government's claim of privilege against revealing the name of the informant.

2. There were no grounds upon which the Court could have instructed entrapment.

V.
ARGUMENT

1. The Court properly sustained the Government's claim of privilege against revealing the name of the informant.

In *Roviaro v. United States* (1957) 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639, the Supreme Court held at pages 60-61:

> "Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."

However, the Court went on to hold in *Roviaro v. United States, supra,* at page 62:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the

possible defenses, the possible significance of the informer's testimony, and other relevant factors."

In *McCray v. Illinois* (1967) 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed. 2d 62, the Supreme Court sustained the claim of privilege.

In the instant case the Appellant's counsel asked the witness Everett Turner did he know a Negro man, 5'10" to 5'11" tall, approximately 28 years old, whose first name is Johnny and he replied he did know a man by the name of Johnny Grant who fitted that description (RT 43, L 11-19).

Out of the prescence of the jury, Appellant's counsel avowed that the Appellant would testify:

> "MR. ROGGE: That Johnny was present when the conversation occurred between Martinez and he, where he was asked to take this package across the border and deliver it to a store. He was paid $5 for it. That he was not told what was in it." (RT 44, L 10-14)

The Government's counsel avowed to the Court that the informer was not Johnny Grant, nor Pedro, or Pete Martinez (RT 45, L 3-10).

At the noon recess, out of the hearing of the jury, Turner was recalled and the following testimony taken:

"BY THE COURT:

"Q Mr. Turner, was the informant in this case Pete Martinez?

"A No, sir.

"Q Was he John Grant or Juan Grant?

"A No, sir.

"Q Was he a Negro male with the first name of Johnny?

"A No, sir." (RT 62, L 14-21)

Appellant's counsel then went on to ask if the informant

had an alias, to which Turner replied not to his knowledge (RT 63, L 18-23). When asked if he knew a Pete or Pedro Martinez, Turner stated he did not (RT 64, L 4).

Turner did testify on cross-examination that the pickup truck was registered to a J. Sanchez (RT 42, L 18 to 43, L 3). On re-direct Turner testified he knows J. Sanchez as the common-law wife of Hector Ambriz (RT 46, L 20-25) and that he saw Hector Ambriz on the Mexican side of the line just prior to the Appellant entering the port in the pickup (RT 46, L 12-19).

As the Court stated:

> "THE COURT: There is a balance of interest here and on the statement of counsel as to the defendant's testimony, there is no basis shown for the setting aside of the informant's privilege. The privilege can be destroyed by going into every detail of it so that finally the person can be identified although not named." (RT 66, L 14-19)

Appellant would have you believe that the Government's Informant duped the Appellant into carrying the heroin. To accept this as a possibility, then it must be accepted that the informer would have used 1.95 ounces (RT 78, L 22) of 46.8% pure heroin (RT 79, L 21) and had enclosed 1.5 ounces of novocaine, an adulterate for heroin, as well as the 1958 truck which was seized, in return for a fee of $200 (RT 65, L 11).

Furthermore, Appellant testified it was a chance meeting on the street when he had come up from Hermosillo to go into the United States to buy clothes, and that this meeting occurred just ten minutes prior to his crossing. This, it is respectfully submitted, is beyond the realm of probability or possibility.

The jury, during its deliberations returned to open Court and the following proceedings in the presence of Appellant and counsel were had:

"THE COURT: I have another note, I assume from the foreman, reading: 'In the Judge's instructions, we would like to know the meaning of the words "and knowingly import," "approximately 53.9 grams of heroin." That is, did the defendant have to know it was heroin?'

"In this regard, members of the jury, before you could convict the defendant of the charge made against him, you would have to find from the evidence beyond a reasonable doubt that he knew that he possessed the substance that he was charged with possessing and further that he knew it was heroin. That is the answer to that question." (RT 120, L 17 to 121, L 2)

The jury was thereby *re-instructed* that a defendant must knowingly possess the heroin and know it is heroin.

It is respectfully submitted the Government's claim of privilege was properly sustained. *Ruiz v. United States* (9th Cir., 1967) 380 F.2d 17; *Rodriguez-Gonzales v. United States* (9th Cir., 1967) 378 F.2d 256 (Compare *Velarde-Villarreal v. United States* (9th Cir. 1965) 354 F.2d 9).

2. There were no grounds upon which the Court could have instructed entrapment.

Appellant claims there were grounds for the Court to have instructed on entrapment, citing *William Nordeste v. United States* (9th Cir., April 4, 1968) No. 21, 294, ... F.2d ....., at page 5 of the slip sheet opinion. The full paragraph reads as follows:

"It is true, as Nordeste argues, that in considering the defense of entrapment, conduct of government agents prior to the transactions in question must also be taken into account. See *Sherman v. United States,* 356 U.S. 369, 374. But there is here no evidence of prior conduct on the part of White which could have led the jury to find that he had induced Nordeste to sell narcotics to McDonnell or any other government agent.[5]"

In that case, as here, there was no evidence of prior conduct of any Government agent to induce Appellant to carry the contraband.

It is respectfully submitted there were no grounds for the giving of an entrapment instruction.

VI.
CONCLUSION

The Government's claim of privilege was properly sustained and there were no grounds for entrapment instruction.

Respectfully submitted,

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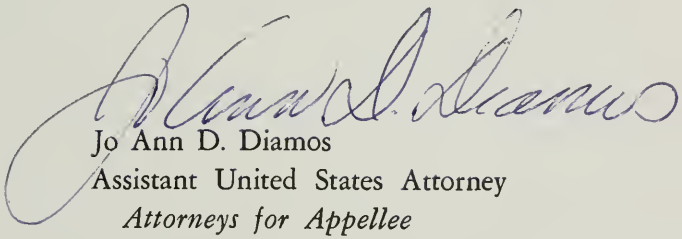

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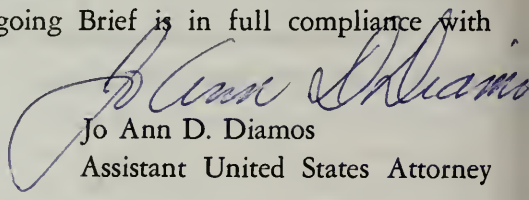
I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



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Three copies of the Brief of Appellee mailed this 27th day of May, 1968, to:

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